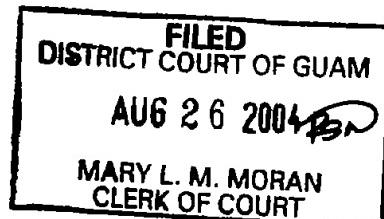


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Attorneys for Defendants  
Continental Micronesia, Inc. dba  
Continental Micronesia and  
Continental Airlines, Inc.

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IN THE DISTRICT COURT OF GUAM

TONY H. ASHTIANI,

Plaintiff,

vs.

CONTINENTAL MICRONESIA, INC. dba  
CONTINENTAL MICRONESIA and  
CONTINENTAL AIRLINES, INC.,

Defendants.

CIVIL CASE NO. CV02-00032

**DEFENDANT CONTINENTAL  
MICRONESIA, INC.'S  
MEMORANDUM REGARDING  
REHEARING ON MOTIONS FOR  
SUMMARY JUDGMENT; REQUEST  
FOR TELEPHONIC APPEARANCE;  
EXHIBITS A-B; DECLARATION OF  
SERVICE**

**DEFENDANT CONTINENTAL MICRONESIA, INC.'S MEMORANDUM REGARDING  
REHEARING ON MOTIONS FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

Defendant Continental Micronesia, Inc. provides this Memorandum Regarding Rehearing on the Motions for Summary Judgment. On August 20, 2004, the Honorable Joaquin V.E. Manibusan, Jr., Magistrate Judge for the District Court of Guam ordered a re-hearing of Plaintiff's Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment, both filed on November 21, 2003, and originally heard on December 12, 2003.

Continental respectfully objects to Magistrate Judge Manibusan's jurisdiction to re-hear the motions, and, in the alternative, provides to the Court a transcript of the original hearing and a synopsis of the summary judgment proceedings to date, and furthermore requests that if a rehearing shall still be conducted by the Court, that counsel for defense be permitted to appear telephonically.

## **II. OBJECTIONS TO JURISDICTION**

The powers and duties of the Magistrate Judge are defined by 28 U.S.C. § 636, Federal Rule of Civil Procedure 73, and the Court's General Order No. 04-00016. Before a Magistrate Judge may entertain a motion for summary judgment, the magistrate must have been "specially designated to exercise such jurisdiction by the district court or courts he serves." 28 U.S.C. § 636(c)(1); Fed. R. Civ. P. 73(a); Gen. Order No. 04-00016 at 6. In addition, the parties must consent to the magistrate's authority to hear the case and to enter judgment. 28 U.S.C. § 636(c)(2); Fed. R. Civ. P. 73(b); Gen. Order No. 04-00016 at 3, 6 ("The Magistrate Judge shall take no case-dispositive action in the case unless and until the parties consent in writing to proceed before the Magistrate Judge."). Such consent may only be obtained if the Clerk of Court first provides written notice to the parties of their opportunity to consent to the exercise of jurisdiction. Fed. R. Civ. P. 73(b); Gen. Order No. 04-00016 at 6. The parties are furthermore "free to withhold consent without adverse substantive consequences." 28 U.S.C. § 636(c)(2); Fed. R. Civ. P. 73(b). Lastly, as General Order No. 04-00016 states, the Magistrate Judge may "[h]ear and determine any pretrial motions . . . *other than case-dispositive motions.*" Gen. Order 04-00016 at 3 (emphasis added).

The above statutory-prescribed process has not been satisfied in this case. Magistrate Judge Manibusan has not been specially designated by the District Court to entertain the summary judgment motions. The parties have not been contacted by the Clerk of Court to

consent to the Magistrate Judge's jurisdiction, and have not consented to such jurisdiction. Finally, hearing case-dispositive motions are explicitly not within the Magistrate Judge's powers.

The Ninth Circuit has *sua sponte* dismissed appeals stemming from cases in which the Magistrate Judge lacked consent to enter a final judgment. See Alaniz v. Cal. Processors, Inc., 690 F.2d 717 (9<sup>th</sup> Cir. 1982). In Alaniz, despite the parties' requests that the Ninth Circuit infer their consent to the Magistrate Judge's jurisdiction, because the parties did not give a "clear and unambiguous expression of consent," the Ninth Circuit concluded that it lacked jurisdiction to review the Magistrate Judge's decision. Id. at 719

In the absence of a clear statement by the parties, the voluntariness of consent cannot be protected and we could be faced in any case with a retroactive attempt to expand or contract the magistrate's authority. We will not permit our jurisdiction to depend on inferences when both the state and common sense call for precision.

Id. Should the Magistrate Judge in this case hear the summary judgment motions without being so designated and without obtaining the consent of the parties, any subsequent decision on such motions will be made without proper jurisdiction.

In light of the Ninth Circuit's strict interpretation of section 636's requirements for a designation of authority and consent from the parties, as well as the language in section 636, Federal Rule of Civil Procedure 73, and General Order 04-00016, Continental respectfully objects to the Magistrate Judge's jurisdiction to re-hear the motions for summary judgment.

### **III. SUMMARY OF PROCEEDINGS**

While the record in this case may appear to be confusing at first blush, Continental submits that a rehearing is unnecessary, and herein outlines the summary judgment proceedings for the Court.<sup>1</sup>

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<sup>1</sup> Defendant also provides to the Court a Summary Judgment Pleading Timeline attached hereto as Exhibit A.

As already stated, on November 21, 2003, both parties filed summary judgment motions. The Court heard the motions on December 12, 2003, and the court reporter has transcribed the oral argument. The court reporter's transcript was filed on January 26, 2004, and is attached hereto as Exhibit B. During and following the hearing, Defendant moved to strike evidence presented by Plaintiff in support of his motion, and, also, following the hearing, Plaintiff sought to strike several of Defendant's exhibits. On April 23, 2004, the Court ruled on the various motions to strike. In particular, the Court ordered that the following be stricken:

1. Exhibits 5, 7, 10, 13, 15, 17-24, 26, 29-38, 40-47, and 49-55 attached to Plaintiff's Motion for Partial Summary Judgment (filed November 21, 2003).
2. Exhibits B-E, J, N, T, and W attached to Plaintiff's Opposition to Defendant's Motion for Summary Judgment (filed November 28, 2003).
3. Exhibits B-D, G, H (Therell letter), and J attached to Plaintiff's Affidavit in Support of Opposition to Defendant's Motion for Summary Judgment (filed November 28, 2003).
4. Declaration of Kathleen P. Sgambelluri (filed November 28, 2003).
5. Declaration of Tony Ashtiani and Exhibit 56 (filed January 9, 2003).
6. Exhibits E, F, J-N, and Q attached to Defendant's Motion for Summary Judgment (filed November 21, 2003).

Because the summary judgment motions have been fully heard before the Court, because the oral argument thereof has been conducted and transcribed, and because the Court has issued an Order on all motions to strike evidence sustaining the motions for summary judgment, Defendant submits that a rehearing is unnecessary.

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Defendant previously submitted this timeline along with its Motion for Sanctions Under Federal Rule of Civil Procedure 11, filed February 11, 2004.

#### **IV. REQUEST FOR TELEPHONIC APPEARANCE**

Notwithstanding the previous discussion on the lack of jurisdiction of the Magistrate Judge, and the outline of the summary judgment proceedings, should the Court still seek to rehear this matter, Continental respectfully requests that it be allowed to appear telephonically, as counsel handling this case and the motions for summary judgment for Defendant, Elyze McDonald, Esq., currently resides in Hawaii.

#### **V. CONCLUSION**

For the foregoing reasons, Defendant respectfully submits this Memorandum Regarding Rehearing on the Motions for Summary Judgment.

DATED: Hagåtña, Guam, August 26, 2004.

CARLSMITH BALL LLP

*for David M. McDonald*  
for DAVID LEDGER  
ELYZE MCDONALD  
Attorneys for Defendant  
Continental Micronesia, Inc. dba  
Continental Micronesia and  
Continental Airlines, Inc.

**EXHIBIT A**

**SUMMARY JUDGMENT PLEADING TIMELINE**

<b>Date of Pleading</b>	<b>Continental</b>	<b>Ashtiani</b>
November 21, 2003	Defendants' Motion for Summary Judgment; Memorandum in Support of Motion; Affidavit of Dixon McKinzie; Declaration of David Ledger; Exhibits A-S	Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment
		Notice and Motion for Partial Summary Judgment
		Declaration of Tony H. Ashtiani in Support of Motion for Partial Summary Judgment
		Plaintiff's Affidavit in Support of Motion for Partial Summary Judgment
November 28, 2003	Defendants' Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment; Affidavit of Dixon McKinzie; Exhibits A-N; Declaration of David Ledger	Plaintiff's Opposition to Deft's Motion for Summary Judgment, Memorandum of Points and Authorities, Declaration of Ron Roberts, Exhibits E and N
		Affidavit of Tony H. Ashtiani in Support of Opposition to Defendants' Motion for Summary Judgment
		Declaration of Kathleen P. Sgambelluri

## SUMMARY JUDGMENT PLEADING TIMELINE

### Date of Pleading

December 5, 2003

### Continental

Reply Memorandum in Support of Defendant Continental Micronesia, Inc.'s Motion for Summary Judgment and Motion to Strike All Unauthenticated Evidence Proffered by Ashtiani; Affidavit of William Herrera; Affidavit of Glenn Mendoza; Supplemental Affidavit of Dixon McKinzie

### Ashtiani

Reply to Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment; Affidavit of Tony H. Ashtiani and Declaration of Tony Ashtiani, Certificate of Service

Affidavit of Tony H. Ashtiani in Reply to Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment

Declaration of Tony H. Ashtiani in Reply to Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment

December 8, 2003

Intentional Delay of Service

December 9, 2003

Affidavit of Jeanne K. Wilson

December 11,  
2003

Affidavit of Tony H. Ashtiani

December 19,  
2003

Opposition to Defendants Motion to Strike Unauthenticated Exhibits; Cross Motion to Strike Defendants Exhibits; Affidavit and Declaration of Vince Diaz; Affidavit of Tony Ashtiani to Authenticate Exhibits on Records

Affidavit of Vince Diaz

Affidavit of Tony H. Ashtiani to Authenticate Exhibits on Records in Support of Opposition to Defendants' Motion to Strike Ashtiani's Exhibits; Exhibits 1 thru 55

## SUMMARY JUDGMENT PLEADING TIMELINE

Date of Pleading	Continental	Ashtiani
December 24, 2003	Defendant Continental Micronesia, Inc.'s Reply Memorandum in Support of its Motion to Strike Plaintiff's Unauthenticated Evidence; Defendant's Memorandum in Opposition to Plaintiff's Cross-Motion to Strike; <u>and</u> Defendant's Motion to Strike Affidavit of Tony H. Ashtiani and Attached Exhibits 1-55, Filed on December 19, 2003	
December 31, 2003		Plaintiff's Reply to Defendant's Opposition to Plaintiff's Counter Motion to Strike and Opposition to Defendant's Motion to Strike Affidavit of Tony H. Ashtiani and attached Exhibits 1-55 filed on December 19, 2003
		Amended Opposition to Defendants' Motion to Strike Unauthenticated Exhibits; Counter Motion to Strike Defendants' Exhibits; Affidavit and Declaration of Vince Diaz; Affidavit of Tony Ashtiani to Authenticate Exhibits on Records
January 9, 2004		Plaintiff's Supplemental Opposition to Defendant's Motion to Strike Affidavit of Tony H. Ashtiani and Attached Exhibits 1-55 on December 19, 2003 and Motion to Strike "Sham" Affidavits and Attached Exhibits by Defendant in Attempt to Obstruct Justice
		Declaration of Tony Ashtiani

## **SUMMARY JUDGMENT PLEADING TIMELINE**

<b>Date of Pleading</b>	<b>Continental</b>	<b>Ashtiani</b>
January 16, 2004	Defendant Continental Micronesia, Inc.'s Memorandum in Opposition to Plaintiff's Motion to Strike "Sham" Affidavits (Filed January 9, 2004)	
	Defendant Continental Micronesia, Inc.'s Motion to Strike Declaration of Tony Ashtiani and Exhibit 56 Filed January 9, 2004	
January 21, 2004	Agreement of Hearing Date; Declaration of Elyze McDonald	
January 22, 2004		Plaintiff's Reply to Defendant's Opposition to Strike "Sham" Affidavits and Attached Exhibits by Defendant in Attempt to Obstruct Justice
		Disagreement of Hearing on Motion to Strike
January 26, 2004		Request for Issuance of Order
		Declaration of Tony H. Ashtiani
January 27, 2004	Response to Request for Issuance of Order	
January 29, 2004		Amended Request for Issuance of Order
January 30, 2004		Plaintiff's Opposition to Defendant's Motion to Strike Declaration of Tony Ashtiani and Exhibit 56 (Filed January 9, 2004)

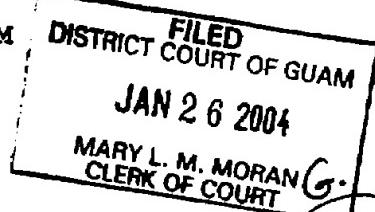
## **SUMMARY JUDGMENT PLEADING TIMELINE**

<b>Date of Pleading</b>	<b>Continental</b>	<b>Ashtiani</b>
February 5, 2004	Defendant Continental Micronesia, Inc.'s Response to Plaintiff's Amended Request for Issuance of Order (Filed January 29, 2004)	
	Defendant Continental Micronesia, Inc.'s Reply in Support of Motion to Strike Declaration of Tony Ashtiani and Exhibit 56 Filed January 9, 2004	
April 23, 2004	<b>Court issues Order on Motions to Strike.</b>	
April 27, 2004		<b>Court issues second Order on Motions to Strike.</b>

## IN THE DISTRICT COURT OF GUAM

TERRITORY OF GUAM

\* \* \*



TONY H. ASHTIANI, )  
Plaintiff, )  
vs. ) CASE NO. CV02-00032  
CONTINENTAL MICRONESIA, INC., )  
dba CONTINENTAL MICRONESIA, and )  
CONTINENTAL AIRLINES, INC., )  
Defendants. )  
-----)

TRANSCRIPT OF PROCEEDINGS  
BEFORE  
THE HONORABLE JOHN S. UNPINGCO  
Chief District Judge

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT  
and  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FRIDAY, DECEMBER 12, 2003

Wanda M. Miles  
Official Court Reporter  
District Court of Guam

ORIGINAL

1           **APPEARANCES:**

2  
3           **FOR THE PLAINTIFF:**

4           TONY S. ASHTIANI  
5           Pro se litigant  
6           P.O. Box 12723  
7           Tamuning, Guam 96931

8           **FOR THE DEFENDANT CONTINENTAL AIRLINES, ETC:**

9           CARLSMITH BALL, LLP  
10          Attorneys At Law  
11          BY: ELYZE McDONALD, ESQ.  
12          Bank of Hawaii Building, Suite 401  
13          134 West Soledad Avenue  
14          Hagatna, Guam 96910

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Wanda M. Miles  
Official Court Reporter  
District Court of Guam

1 HAGATNA, GUAM; FRIDAY, DECEMBER 12, 2003; 11:07 A.M.

2 \* \* \*

3 THE CLERK: Civil case 02-00032, Tony H.  
4 Ashtiani versus Continental Micronesia, Inc., et  
5 cetera, et al., motion for partial summary judgment,  
6 and motion for summary judgment.

7 Counsel, please state your appearances.

8 MS. McDONALD: Your Honor, Elyze McDonald for  
9 defendant Continental Micronesia, Inc., with Mr. Dixon  
10 McKinzie, who is the Human Resources Director of  
11 Continental.

12 MR. ASHTIANI: Your Honor, Tony H. Ashtiani,  
13 pro se litigant.

14 THE COURT: Okay. Let's start with the  
15 defense motion.

16 MS. McDONALD: Thank you, Your Honor.

17 May it please the court.

18 First I'd like to thank the court for its  
19 order granting me to appear telephonically. As you've  
20 noticed since giving that order, based on a family  
21 emergency that brought me to Guam, so I'm able to make  
22 it here for the motion hearing.

23 I want to start off just by stating what the  
24 undisputed facts are in this case, and then attempt to  
25 talk about both motions.

Wanda M. Miles  
Official Court Reporter  
District Court of Guam

1                   The first undisputed fact is that attendance  
2 procedures at Continental are governed both by  
3 Continental attendance policy and by the union  
4 agreement between Continental and the International  
5 Brotherhood of Teamsters. Both documents say that if  
6 an employee is going to be absent for work, he needs  
7 to call in and talk to his supervisor. That's an  
8 undisputed fact.

9                   The second undisputed fact is that  
10 Mr. Ashtiani did not call in for work on two  
11 consecutive days, June 23rd and 24th, 2001. In those  
12 two documents, the two attendance policies, two days no  
13 reporting to work and not showing up for work is cause  
14 for discipline, not to exclude termination. And it  
15 says that in both documents.

16                  The last undisputed fact is that Continental  
17 discharged Mr. Ashtiani on July 3rd, 2001. And as  
18 you'll see from our Exhibit C, it was for the basis  
19 that he didn't show up and call in to report his  
20 absence to his supervisor for June 23rd and June 24th.

21                  With that in mind, the standard that the Court  
22 needs to engage in analyzing this motion is that the  
23 plaintiff, in order to defeat summary judgment, needs  
24 to provide significant probative evidence for his case  
25 that any genuine issue of material fact exists.

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Official Court Reporter  
District Court of Guam

1           There are eight causes of action in this case,  
2 as you can see from the second amended complaint, but  
3 the central cause of action is discrimination on the  
4 basis of race. And in that, the Supreme Court has  
5 prescribed a formula, as you're aware, with McDonnell  
6 Douglas formula where the plaintiff first has to show a  
7 pattern in each case of discrimination, then the burden  
8 shifts to defendant to show a non-discriminatory,  
9 legitimate reason for the termination, and then the  
10 burden shifts back to the plaintiff to show pretext.

11           In a discharge case, the Ninth Circuit has  
12 said that the plaintiff needs to show that he was doing  
13 his job well enough throughout the possibility that he  
14 was discharged for some other reason. And the fact is  
15 that he failed to show up for work and talk to his  
16 supervisor to get approval for two consecutive days.  
17 And under the rules of Continental and International  
18 Brotherhood of Teamster, he violated that policy by  
19 not doing that. That in itself shows that he was not  
20 performing adequately at work.

21           So the burden then shifts to Continental to  
22 show a legitimate, non-discriminatory reason. And  
23 that's the same reason; he didn't show up for work,  
24 he didn't report his absence and get approval from the  
25 supervisor. It's the same reason for why he wasn't

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Official Court Reporter  
District Court of Guam

1 performing adequately.

2 So then the burden shifts back to Ashtiani, to  
3 Mr. Ashtiani to show pretext. And the Ninth Circuit  
4 has two rules: You have to show direct evidence of  
5 discrimination, of which Mr. Ashtiani has not provided,  
6 or you provide indirect evidence that the reason that  
7 Continental furnished for terminating him was false.  
8 He hasn't provided any evidence that Continental's  
9 reason was false.

10 And I wanted to discuss just briefly the  
11 evidence that he has provided. None of it meets the  
12 standard required under the summary judgment, or a  
13 clear majority of it. His affidavits, he has only  
14 provided affidavits by himself that are sworn. The  
15 other affidavits are not sworn testimony, they're not  
16 admissible before the Court.

17 He's provided declarations from people, and  
18 if you read the notarization on the declarations, the  
19 notary is only notarizing that he has brought to the  
20 notary a copy of a document that somebody else has  
21 signed. This is not legitimate for a summary judgment,  
22 in support of a position for summary judgment.

23 He has provided doctor's reports that are  
24 illegible. He has provided statistical studies with  
25 no information who did the study, what is it studying,

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District Court of Guam

1 what was the base, what, you know, what was his back-  
2 ground in being able to provide this sort of study.  
3 This is evidence that the court should not consider.  
4 And as you've seen from reply, we have requested a  
5 motion to strike all the unauthenticated evidence.

6 Every other count, Your Honor, is superfluous  
7 to this discrimination case. A lot of it has  
8 absolutely no basis in the law, and there's no -- he  
9 hasn't provided any authenticated evidence in support  
10 of any of his other claims.

11 So unless the Court has any questions on  
12 particular pieces of evidence, or on any count,  
13 Continental will rest for now, and wait for  
14 Mr. Ashtiani's response.

15 THE COURT: Okay.

16 MS. McDONALD: Thank you.

17 THE COURT: Mr. Ashtiani.

18 MR. ASHTIANI: May I?

19 THE COURT: Yes.

20 MR. ASHTIANI: Thank you, Your Honor.

21 Your Honor, first good morning.

22 And I'd like to say good morning to defense.

23 And that first and most, Your Honor, I want  
24 to apologize because last time I was here arguing my  
25 motion, I sat down on that table in front of my tables

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District Court of Guam

1 and I did not know to stand here, but now I know  
2 because I watched other arguments.

3 Your Honor, I filed a partial summary judgment  
4 because I selected those cause of action that I could  
5 meet the elements.

6 THE COURT: Okay, let me steer you a little  
7 bit, Mr. Ashtiani. There's some important things that  
8 we're looking at, right now we're looking at the  
9 defendant's motion, and when they done I'll turn to  
10 your motion.

11 MR. ASHTIANI: Yes, Your Honor. The only  
12 difference --

13 THE COURT: So I need you to respond. There  
14 are some legitimate questions being raised here.

15 MR. ASHTIANI: Okay, Your Honor.

16 THE COURT: And one of the legitimate  
17 questions being raised is the evidence you have  
18 submitted that are unauthenticated. Okay. And  
19 unauthenticated evidence is evidence that really is  
20 of dubious value, and that's why most courts say it's  
21 inadmissible. Okay. There's no safeguard for the  
22 truth in it. Let me give you an example here.

23 When you submit an affidavit, you swear under  
24 oath that the statements you're going to make are true  
25 and correct. Okay. That's a safeguard for the truth.

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District Court of Guam

1       But when you submit, say, what somebody has written to  
2       a notary to notarize, there's no safeguard for the  
3       truth because it is you submitting somebody else's  
4       declaration. You can't vouch for that person's  
5       truthfulness; the notary can't vouch for that person's  
6       truthfulness. The net result is that that kind of  
7       evidence is very suspect and often not allowed into  
8       court.

9               Now, that being the case, do you have any --  
10      besides the information you have submitted, is there  
11      any other information that, or evidence that you have  
12      that is authenticated?

13               MR. ASHTIANI: Your Honor --

14               THE COURT: Safeguards for the truth?

15               MR. ASHTIANI: Your Honor, all the evidence  
16      that I have submitted are basically on my personal  
17      knowledge, which is in the Rule 56 that says based on  
18      the personal knowledge, which I have done those in each  
19      paragraphs.

20               THE COURT: Okay.

21               MR. ASHTINAI: In lieu of that, Your Honor,  
22      Rule 56(e) states that certified copy attached to the  
23      affidavit part of, which I've done that also; I took  
24      in these original documents that were signed by the  
25      employees, and I have given it to the notary, I showed

Wanda M. Miles  
Official Court Reporter  
District Court of Guam

1 him the certified copy -- I showed him the original  
2 copy and he has certified those copies of the original.

3 THE COURT: Yes, but that certification goes  
4 only to the fact this is an accurate copy of the  
5 original.

6 MR. ASHTIANI: Right.

7 THE COURT: It does not go to the contents of  
8 the document. That's the issue here. It is what is  
9 stated in the documents that we are interested in, in  
10 terms of assessing how truthful those contents are.

11 MR. ASHTIANI: Your Honor, all these  
12 individuals that had given their statements, they're  
13 very credible individuals, and I do not see any  
14 difference between their affidavit which I have  
15 submitted, with the affidavit that Mr. McKinzie has  
16 submitted, all the facts that he had stated that, is  
17 that I'm submitting my facts, based on my personal  
18 knowledge. So, basically, I do not really see the  
19 difference between his affidavit and the affidavit  
20 that I have submitted.

21 THE COURT: Okay.

22 MR. ASHTIANI: And basically, Your Honor, it's  
23 the fact that the two days no-call no-show. We have  
24 evidence of the shift schedule that there has been many  
25 individuals that have called in and they have called in

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Official Court Reporter  
District Court of Guam

1 to another mechanic; they do not directly have to talk  
2 to a supervisor.

3 Now what is before the court is that that  
4 application has applied to a certain race and  
5 nationality of the majority, and Ashtiani among all  
6 the employees, they must call in direct to the  
7 supervisor. That is a disparate treatment, Your Honor,  
8 under the strict impact.

9 THE COURT: But in order for you to show that  
10 in a court of law, you have to get an affidavit from  
11 these other mechanics that called in to another  
12 mechanic, not a supervisor; they're the ones that have  
13 to make a sworn statement that on such and such a date  
14 I called in sick or whatever, I told this mechanic and  
15 the mechanic related to the supervisor or whatever, and  
16 I was never reprimanded and no adverse action was given  
17 to me for having done this procedure, or for having  
18 been absent from work, or both. Okay?

19 MR. ASHTIANI: Yes.

20 THE COURT: That's the kind of proof we need.  
21 Now absent that kind of proof -- what you know is fine,  
22 but, you know, you need to understand you're also the  
23 party at interest here, that is that, you're the one  
24 with the most to lose, should you lose. Okay. So,  
25 there is of course some caution that needs to be given

Wanda M. Miles  
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District Court of Guam

1       whether to believe everything you say.

2            MR. ASHTIANI: Uh-huh.

3            THE COURT: Okay. And so that's what we're  
4 after here.

5            MR. ASHTIANI: Your Honor, Mr. McKinzie also  
6 has interest in this party, and in his affidavit we do  
7 not know that the documents presented before us if it's  
8 authenticated in reference to the e-mails.

9           And, Your Honor, if I may, please, I knew that  
10 this thing might come up, and what the defendant is  
11 basically saying that these are hearsay documents under  
12 Rule 803, and that in the United case, Your Honor,  
13 United asserts the court here in failing to admit these  
14 exhibits as exception to the hearsay rule under Federal  
15 Rules of Evidence 801, 803 and 803(a)(c). Even if  
16 United exhibits are admissible as exception to the  
17 hearsay rule, the trial court still has the duty to  
18 balance the probative value of the evidence against its  
19 potential for unfair prejudice under Federal Rules of  
20 Evidence 403.

21           THE COURT: Well, what exception to the  
22 hearsay rule are you advocating for those documents  
23 you're trying to get in?

24           MR. ASHTIANI: Basically, Your Honor, some of  
25 those documents can be self-authenticated, which I have

Wanda M. Miles  
Official Court Reporter  
District Court of Guam

1 done, and it's under the exception of the rule, Rule  
2 803 or 802.

3 THE COURT: Are they business records, are  
4 they --

5 MR. ASHTIANI: Basically, Your Honor, those  
6 documents that I have submitted, they came out of  
7 Continental Micronesia maintenance office, which  
8 basically says that these employees had called in  
9 another mechanic, not the supervisor, and that's what  
10 I have submitted. And I have sworn, subscribed sworn  
11 before the notary that those documents are legitimate  
12 document, Your Honor.

13 THE COURT: Okay.

14 MR. ASHTIANI: Furthermore, Your Honor,  
15 balancing the probative value of the evidence against  
16 its potential of prejudice is a discretionary decision  
17 for the trial judge, which will be not overturned  
18 unless it's clearly erroneous.

19 Your Honor, I have not submitted any erroneous  
20 evidence; I have submitted what has come from the  
21 maintenance office, from my co-worker, and I have asked  
22 them that if they can bring any samples that any  
23 mechanic has called another mechanic, not the  
24 supervisor, which I have done so.

25 THE COURT: Well, but you're misreading the

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Official Court Reporter  
District Court of Guam

1 rule. The rule is whether the, when the judge admits  
2 the evidence, the judge has made an error in admitting  
3 the evidence. It is not whether the evidence is  
4 erroneous in and of itself, it's the substance of the  
5 evidence; whether it's erroneous is not what's at  
6 issue. What is at issue is whether the judge abused  
7 his discretion, that is, he did something that he  
8 shouldn't have done.

9 But, go ahead.

10 MR. ASHTIANI: Okay, Your Honor. And I just  
11 want to tell you that those documents that I have  
12 submitted, they're all -- they're all legitimate  
13 document, there's nothing that I have turned in, and  
14 I respectfully ask the court to examine it and check  
15 into it in going through this.

16 THE COURT: Thank you.

17 MR. ASHTIANI: Thank you, Your Honor.

18 THE COURT: Anything else?

19 MR. ASHTIANI: Not at this point, Your Honor.

20 THE COURT: Thank you.

21 Response, if necessary, or do you stand by  
22 your earlier argument, Ms. McDonald?

23 MS. McDONALD: May I just make one point, Your  
24 Honor?

25 THE COURT: Yes.

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1 MS. McDONALD: Mr. Ashtiani raises his  
2 unauthenticated evidence that other employees were  
3 allowed to call in and report absences for work but  
4 didn't have to speak to a supervisor. This still  
5 doesn't fulfill the burden that he has to show that  
6 Continental's reason for terminating him was false,  
7 that's the pretext argument. So, while it may have  
8 some issue with respect to the *prima facie* case, it  
9 still does not fulfill his case to demonstrate pretext  
10 on Continental's behalf.

11 Thank you, Your Honor.

12 THE COURT: Thank you.

13 Let's switch now to the plaintiff's motions  
14 for summary judgment. Mr. Ashtiani, give me your best  
15 shot on that.

16 MR. ASHTIANI: Thank you, Your Honor.

17 Your Honor, if I, may it please the court, to  
18 indicate that as far as the attendance, Your Honor, I  
19 do not understand what is the sales of a fraudulent  
20 insurance to the employees has to do with attendance.  
21 Okay. That is basically a discrimination here, because  
22 they're denying benefits to one employee that has paid  
23 for the benefits and then they turn around, give a  
24 document that has been whited out. And it has happened  
25 to other families here, that they have checked a

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1           legitimate claim against the insurance company.

2           That has nothing to do with attendance, Your  
3 Honor; that is something that, a cause of action needs  
4 to be looked at. And I have been asked to provide the  
5 name of the witnesses and supplement my answer, and I  
6 have not done so because I'd like to maintain my  
7 confidentiality into the names of those witnesses.

8           And they're bringing up issues that is  
9 irrelevant, Your Honor, to the attendance issue, and  
10 those things need to be looked at.

11          Your Honor, in regards to my own motion, I  
12 have been denied a fair hearing, as you're well aware,  
13 and that is within my constitutional rights. And  
14 that's due process. Any man has the right to a fair  
15 hearing. And that I was not given a fair hearing. And  
16 prior to the hearing they had requested my final check.  
17 That indication, Your Honor, that is a violation of  
18 this Title 7, which we have before you.

19          Furthermore, Your Honor, plaintiff right and  
20 the defendant's duty do not arise from express promise  
21 made by either party, or from promise implied by law  
22 because of benefit received or return of service, but  
23 rather, from recognition of social right of equality,  
24 of opportunity or person regardless of race.

25          Your Honor, I was denied to indicate what

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1 had happened, and that if I would have given the  
2 opportunity, none of this would have happened. And  
3 Mr. Mark Williams even indicates, hey, what is the  
4 meeting about, and they do not allow him to have any  
5 kind of indication what the meeting is all about.

6 Furthermore, Your Honor, in the Title 7 mostly  
7 the district judges, the honorable judges had even in  
8 Supreme cases are not interested to rehash what has  
9 happened five years ago or neither what had happened  
10 two years ago. What the court has stated in similar  
11 cases are the languages, like the specific reason and  
12 the stated reason for termination.

13 And the termination letter, Your Honor, such  
14 as this, which has the Continental Micronesia logo on  
15 it, the specific reason for the termination were two  
16 days no-call no-show. Okay. I can even submit a Guam  
17 Cell invoice that I called in to work and my call was  
18 -- and that's a legitimate document; if the court asked  
19 me to provide that, I can do that. And that the call  
20 was made in, Your Honor, and that this is what the  
21 legitimate complaint.

22 The defendant had oppor -- the defendant had  
23 the right to write a 15-page termination letter and put  
24 60 reasons that I was terminated. But, Your Honor,  
25 that's not what this letter says. This letter says

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1 Ashtiani did not call in to work for June 23, June 24,  
2 which is false. Because Joe Pangelinan declaration  
3 states that Tony called in, and Ron Roberts declaration  
4 states, Your Honor, that if Glenn Mendoza were to have  
5 told Bill Herrera that Tony called in, none of this  
6 would have happened. That's what this letter states,  
7 Your Honor.

8                 And in the Supreme Court cases, Aikens  
9 (phonetic) and Burdine, it's clear, plaintiff can  
10 prevail either by proving the discrimination more  
11 likely motivated the decision, or that employer  
12 articulated reason is unworthy of belief, Your Honor.  
13 I have proven that, I have proven all these three  
14 reasons that they're unworthy of belief, and I have put  
15 that on my motion, on the first original motion that I  
16 had submitted to the court.

17                 And simply disproving defendant's reason is  
18 enough, which I have done so, Your Honor. Plaintiff  
19 need not also prove intentional discrimination, such  
20 an approach unjustify and multiplies the plaintiff's  
21 burden. And I have been burdened with that, and I have  
22 proven that. And I have shown the statistics that  
23 while 9.2 percent of the work force is minority, we  
24 only were ten minorities, Your Honor, working for the  
25 maintenance department. Out of that ten, three

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1           minorities were terminated. And those statistical  
2           evidence, Your Honor, just like the United case, is a  
3           very important evidence before the court.

4           Your Honor, the reason that the Supreme Court  
5           cases say articulate a reason for termination is  
6           because two and a half years later the defendant wants  
7           to change the reason for termination. They want to  
8           say, well, Ashtiani didn't call up this day, or he  
9           didn't call his supervisor, or this and that. That is  
10          why they indicate articulate a reason for termination,  
11          specific reason for termination, so they can't change  
12          that later on down the road.

13          And, Your Honor, for Mr. McKinzie, with all  
14          the respect to him, that he says that Mr. Lee's  
15          termination was retracted in his affidavit, now, I  
16          don't understand what's, you know, if his affidavit  
17          is not true, I fear, Your Honor, Rule 56(g), that bad  
18          affidavit made. And he states that Mr. Lee was  
19          retracted, yet Mr. Lee is working at Sears. So in his  
20          affidavit he says his termination was retracted, here  
21          he's not working for CMI. I don't understand that in  
22          his affidavit, Your Honor. If my affidavit is not  
23          admissible, then I just need to understand, I need to  
24          read the rule more then.

25          But, Your Honor, them changing the rule and

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1 saying that, coming out with another affidavit of  
2 Mr. Herrera and Mr. Glenn Mendoza; that they were off  
3 island on the day that the motion was due to be  
4 submitted, that is enough to affirm that evidence of  
5 guilt.

6 And it states in here, Your Honor, the trier  
7 of fact can reasonably infer from the falsity of the  
8 explanation that the employer is dissembling to cover  
9 up a discriminatory purpose. Such an interference is  
10 consistent with the general purpose -- principle of  
11 evidence law that the fact finder is entitled to  
12 consider a party dishonesty about a material fact as  
13 affirmative evidence of guilt.

14 And that's what we have here, Your Honor.  
15 This affidavit states that Mr. Lee's termination  
16 retracted; that is not true.

17 And that the defendant has -- furthermore,  
18 Your Honor, I don't know if the court is aware that I  
19 did submit an affidavit yesterday, one day prior to the  
20 hearing, per Rule 56(c), and that defendant is relying  
21 on manufactured e-mails, on internal e-mails from each  
22 other, which those e-mails could not even be sent, and  
23 that needs to be looked at, Your Honor.

24 And basically that's what I have. I do not  
25 want to repeat what I have written to the court because

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1 I know that this court is very thorough in looking at  
2 documents. And plaintiff rests at this time, Your  
3 Honor.

4 THE COURT: Thank you.

5 Defense?

6 MS. McDONALD: Thank you, Your Honor.

7 The issues with regard to Continental's motion  
8 for summary judgment, and Mr. Ashtiani's motion for  
9 partial summary judgment are the same. Mr. Ashtiani  
10 has repeated his arguments in pretty much all the  
11 documents that he's submitted. So except for the fact  
12 that in his motion for partial summary judgment he does  
13 not address two issues--one is the fraudulent insurance  
14 and the second is the violation of FMLA. So his  
15 bringing up the issue of fraudulent insurance is  
16 misplaced at this time in the hearing.

17 For his motion for summary judgment, he has  
18 to prove every element as the plaintiff in this case.  
19 At this point, I'd like to incorporate all of our  
20 arguments made during our motion for summary judgment  
21 in response to his partial motion for summary judgment,  
22 and claim that there are no genuine issues of material  
23 fact, but instead, they are all in favor of  
24 Continental, and that would be proper for granting  
25 Continental's motion for summary judgment and denying

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1 his motion for partial summary judgment.

2           He, Mr. Ashtiani brings up an issue that  
3 there's this invoice about cell phone calls that he  
4 made to Continental. Well, he hasn't produced them.  
5 And second of all, they don't show that he spoke to  
6 supervisors, which is what was required of him under  
7 Continental's attendance policy.

8           He brings up arguments regarding meetings that  
9 happened after he was absent for two days and didn't  
10 talk to his supervisors; those meetings are irrelevant  
11 to this case.

12          He brings up Mr. Bruce Lee and wonders why  
13 Mr. Lee works at Sears now. Well, that also has  
14 nothing to do with this case. The fact is that  
15 Mr. Ashtiani does not have any personal knowledge about  
16 Mr. Lee's case, he was not his supervisor, he had no  
17 supervisory capacity over Mr. Lee, and he does not know  
18 the background behind Mr. Lee's termination and  
19 subsequent retraction of that termination, and why  
20 Mr. Lee no longer works for Continental right now.

21          Lastly, I'd like to just discuss the  
22 supplemental affidavits that we had brought before the  
23 court. Mr. Mendoza and Mr. Herrera were not available  
24 to sign those affidavits by the time we filed our  
25 motion, but we believe that all the documents that we

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1 submitted attached to our motion are properly  
2 authenticated by Mr. McKinzie.

3 THE COURT: Thank you.

4 MS. McDONALD: Thank you.

5 THE COURT: Anything else, Mr. Ashtiani?

6 MR. ASHTIANI: No, Your Honor, plaintiff will  
7 rest.

8 THE COURT: The court will take this under  
9 advisement. Thank you very much.

10 MS. McDONALD: Thank you, Your Honor.

11 MR. ASHTIANI: Thank you, Your Honor.

12 (Whereupon proceedings concluded.)

13 \* \* \*

14 CERTIFICATE OF REPORTER

15 CITY OF AGANA        )  
16                        ) ss.  
16 TERRITORY OF GUAM    )

17 I, Wanda M. Miles, Official Court Reporter  
18 of the District Court of Guam, do hereby certify the  
19 foregoing pages 1-23, inclusive, to be a true and  
20 correct transcript of the shorthand notes taken by me  
21 of the within-entitled proceedings, at the date and  
22 time therein set forth.

23 Dated this 22nd day of January, 2004.

24

25

(Wanda M. Miles)

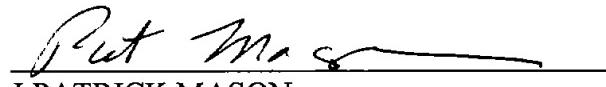
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**DECLARATION OF SERVICE**

I, J.Patrick Mason, hereby declare under penalty of perjury of the laws of the United States, that on the 26<sup>th</sup> day of August 2004, I will cause to be served a copy of DEFENDANT CONTINENTAL MICRONESIA, INC.'S MEMORANDUM REGARDING REHEARING ON MOTIONS FOR SUMMARY JUDGMENT; REQUEST FOR TELEPHONIC APPEARANCE; EXHIBITS A-B; DECLARATION OF SERVICE, upon Plaintiff Tony H. Ashtiani.

I declare under penalty of perjury (28 U.S.C. §1746) that the foregoing is true and correct.

Executed this 26<sup>th</sup> day of August 2004 at Hagåtña, Guam.

  
\_\_\_\_\_  
J.PATRICK MASON